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March 20, 1995

FEDERAL COMMUNICATIONS COMMISSION
1919 M Street, N.W.
Washington, D. C. 20554

Attn: Secretary

Gentlemen:

Enclosed is the original and nine copies of the Comments of Smith and Powstenko in WT Docket No.95-5.

If there are any questions on this matter, please communicate with the undersigned.

Respectfully submitted,

Neil M. Smith

NMS/pas

Encl.

cc: Mr. Alexander G. Smirnoff

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ORIGINAL

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D. C. 20554

In the matter of
Streamlining the Commission's Antenna Structure Clearance Procedure

and

Revision of Part 17 of the Commission's Rules Concerning Construction, Marking, and Lighting of Antenna Structures

WT Docket No. 95-5

COMMENTS OF SMITH AND POWSTENKO

These comments represent the opinions of Smith and Powstenko and the Empire State Building ("ESB"), as well as the other buildings owned or managed by organizations associated with ESB. Smith and Powstenko has been active in the field of broadcasting and telecommunications for 34 years and regularly deals with the matters under consideration in this proceeding. ESB is the transmitting site for numerous broadcasting and telecommunications facilities and has so functioned for over 40 years.

It should be noted that certain of these Comments are responsive to matters of concern to Smith and Powstenko but not directly to ESB. However, ESB concurs in such Comments.

We take no position on the generalities of the Commission's

proposal. We accept the contention that the proposal will simplify the Commission's processes, thereby benefiting both the broadcast licensees and the public, and believe the inclusion of the owners of structures in this process is not an unacceptable burden. Indeed, structure owners should always have worked in cooperation with licensees on these matters.

Regarding the specifics of the Commission's *NPRM*, we respond to certain items as follows:

16(a). Should the Rules cover registration of structures not requiring marking and lighting? We can see no need to register structures that are not sufficiently hazardous to require marking and lighting. There may be some administrative convenience in having *every* structure registered, but there must be some limit to the number of registrations, even with the Commission's computer capability. The more structures included in the registry, the greater the opportunity for data error.

16(d). Should structure registration require renewal? Because the data base would require occasional weeding out, we accept the concept of renewal on a regular basis. However, since this process would be intended only to catch changes not reported, in clear violation of the proposed Rule, renewals need not be frequent. A period of about ten years would seem reasonable.

16(e). Should a registration fee be imposed? It is our position that a fee is not required where the submission will, as

noted in Paragraph 15 of the *Notice*, save substantial government expenditure. Further, a fee would be a further obstacle to the voluntary cooperation of non-licensee owners of structures.

Consider the tallest building in a very small town, only three or four stories high. If the Land Mobile licensee using its roof tells the landlord that he must register his building with the FCC, the owner may well decide simply to cancel the Land Mobile station's lease, and he might be particularly inclined to do so if he also has to pay a fee. It has become increasingly difficult for telecommunications licensees to find suitable transmitting sites, especially now that so many environmental regulations prohibit new construction. It cannot be in the public interest to create disincentives to the use of existing structures by Commission licensees.

The Commission charges fees to those who request its action on a proposal. In this case, it would be asking others to take action for the Commission's benefit, and to demand a fee for such favors would be unconscionable.

16(f). Should all structures or all structures with higher powered facilities be registered, to assist in resolving complaints? We believe that to enlarge the registration list in this way could make the system unwieldy and filled with inaccuracies. High powered facilities, such as broadcast stations, have well established

locations and heights, which are listed in other data bases. The Commission should use its own registrations solely for its intended purpose of simplifying FCC processing of airspace issues.

16(g). How should structure owners be advised of their new responsibilities? It would appear that the Commission would often have no way of knowing who the owner of a particular antenna structure is. We believe that the most practical approach would be to make initial contact through the licensees. Publication in the *Federal Register* would probably not reach all of the licensees. Direct contact with the licensee would often entail no follow-up, since many licensees own their own towers. Where they do not, they could easily pass the FCC notice along to their landlords.

16(h). In what way should the Commission's environmental Rules relate to structure registration? The registration of towers is not an "action" in the same way as is the grant of an application, and we see no need to consider the environmental Rules in this regard. Existing structures would necessarily be registered simply because they are there, regardless of their environmental impacts. New structures would receive environmental study as part of routine processing. The act of registration would be a clerical action only, involving no decision-making that could involve considerations of the environment.

16(i). Should Part 17 specify a particular accuracy in

geographic coordinates and height? It is current practice to specify geographic coordinates to the nearest second and height to the nearest meter. However, it is often difficult for one to know how accurate one's data is. USGS topographic maps typically permit the derivation of coordinates to the nearest second, but not in all all cases. The establishment of ground elevation by reference to topographic contour lines, most often in ten-foot gradations, makes it common for actual ground elevation to be as much as two meters different from the interpolated value. Architectural drawings showing accurate height figures for older structures may no longer be available.

To require a higher level of accuracy would in most cases require that a surveyor be retained, at substantial cost. The FAA requires survey data under certain circumstances, but there is normally no reason for such precision. A blanket requirement for professionally established heights would represent an undue burden on structure owners. As with registration fees, structure owners may simply evict the licensee rather than bother with registration when it becomes exacting and expensive.

There are two other matters that demand comment. In Paragraph 8 of the *Notice* the Commission proposes "to require that the Registration Number be conspicuously displayed on or around the antenna structure." In the case of ESB this is not possible, since the building is an historical

landmark. Such a requirement may be reasonable in the case of simple skeletal structures but may be quite perplexing where buildings are used as antenna structures.

We see no real purpose in this conspicuous-posting requirement, since the Registration Number would be meaningless to the general public. It could be required to be made available to broadcast applicants who have permission to specify the structure as a proposed site, however. If there is a reason for such a generalized Rule that we do not see, it must recognize that conspicuous display is impractical or impossible in many cases.

Further, and of great importance to ESB and us, is the statement in Paragraph 19 of the *Notice* that existing tower structures would be grandfathered for a period of ten years, after which they would be required to employ the marking and lighting then specified in the Rules. This proposal is a total break with precedent and would require the meaningless expenditure of countless millions of dollars.

Under current Rules antenna structures are marked and lighted in accordance with the standards in place at the time they are constructed and are never required to meet newly adopted standards. This practice has not resulted in significant hazard, to our knowledge. Under this proposal, however, by January 1, 2006, every then-nonconforming structure would have to change its marking and lighting to meet the as yet unknon standards then in effect. We are speaking of the more than 70,000 existing antenna structures

identified by the Commission. The cost of their compliance with this Rule would be immeasurable.

Further, as already discussed, many telecommunications licensees pay only a nominal fee for the use of a particular supporting structure and can afford neither higher rental rates nor the cost of modifying the marking and lighting of the structure. One may presume that such licensees will simply lose their sites if substantial expenditure is required for continued registration.

Finally, there is at least one antenna structure that would be unable to comply with such a requirement in the year 2006. In 1951 the Empire State Building installed a self-supporting tower atop its mooring mast to accommodate broadcasting and telecommunications facilities. The FAA required a red beacon atop the tower and red side lights on the tower, and these were required to operate 24 hours a day. However, the FAA did not require marking. In 1985, changes were made in the antennas on the tower, resulting in a slight reduction in the overall building height. The FAA was routinely notified of this change, and it routinely issued a Determination of No Hazard.

It was not until about 1990 that it was discovered that the 1985 FAA determination included a requirement that the structure be painted international orange and white. This came to light because FCC authorizations for facilities on the building began to show this requirement, and permittees were unable to comply with it. Being a landmark, ESB cannot be

painted in this manner, nor can high-intensity lighting be employed as an alternative.

The problem was brought to the attention of the FAA on April 16, 1990, but it was not until April 21, 1993, that the matter was resolved and the building permitted to maintain its existing lighting pattern. The Commission's FM and TV Branches are well aware of this history, because they were forced to issue Special Temporary Authority to certain licensees and repeatedly extend other authorities while this process plodded forward.

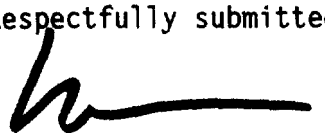
Because the FAA required painting, the FCC permits required painting. Because ESB was not painted, no permittee could show compliance and receive a license. Exhaustive time, effort, and expense by ESB was required finally to settle the matter. If the Commission should proceed to adopt a requirement that marking and lighting be enforced in 2006, it is hereby put on notice that it will have to waive such a Rule in at least one instance, unless it intends for all ESB licensees to move to some other location. Further, it is certain that many other antenna structure owners will be unable to comply with this Rule for a variety of valid reasons.

Because of the great financial burden and the inability of certain structure to be so modified, regardless of cost, and because no justifiable need has been demonstrated, the Commission should not adopt this part of its proposal.

* * *

Since it appears that the Commission has determined that antenna structure registration will significantly expedite its processes and produce significant net savings, we do not object to the basics of this proposal. However, as discussed, certain aspects of the proposal must not be adopted. What started off as a simple change in the way the Commission keeps its records of antenna structures has become in certain features a radical change in the standards of tower specifications, marking, and lighting. There being no indication that the existing standards are inadequate, and there being ample evidence that such changes in standards would be expensive in the first place and difficult or impossible to implement in the second, the Commission should refrain from adopting those Rules that effect a change in current standards.

Respectfully submitted,



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